SUPREME COURT, U. S.

NOV 29 1967

JOHN F. DAVIS, CLERK

No. 742

# In the Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF MARYLAND, ET AL., APPELLANTS

*v.*

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND*

## MEMORANDUM FOR APPELLEES

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL., APPELLANTS

*v.*

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND*

## MEMORANDUM FOR APPELLEES

This action was brought by the State of Maryland, subsequently joined by twenty-seven other States and one school district, to enjoin, as unconstitutional, enforcement of the 1966 Amendments to the Fair Labor Standards Act insofar as those amendments extended the minimum wage and overtime provisions of the Act to employees of the States or their political subdivisions employed in "a hospital, institution, or school" (J.S. App. 54a).[1] A three-judge district court

[1] While the 1966 Amendments also extended the minimum wage and overtime coverage to employees engaged in the operation of various transportation facilities such as railways, buses and trolleys, the States apparently do not challenge that aspect of the amendment (J.S. 3; J.S. App. 1a–2a).

denied appellants' motion for summary judgment and on the basis of stipulated facts granted the government's motion to dismiss the complaint, each judge writing a separate opinion (J.S. App. 1a–51a; 269 F. Supp. 826). Circuit Judge Winter concluded that the application of both the minimum wage and the overtime provisions of the Act to the States and their political subdivisions was constitutional. District Judge Thomsen joined Judge Winter in upholding the minimum wage provisions and in ordering that the complaint be dismissed, but expressed doubt as to the constitutionality of the application of the overtime provisions to the States, stating that that question must be decided in the context of specific situations presented in future cases.[2] District Judge Northrop was of the opinion that both the minimum wage and the overtime provisions as so applied were unconstitutional.

The primary issue raised by this case is whether Congress, in the exercise of its power to regulate interstate commerce, may constitutionally require that a State comply with the minimum wage and overtime

[2] Judge Thomsen's view requires that the "extent of the interference with an indispensable state function," alleged by appellants to be brought about by application of the Act's overtime provisions, be balanced against the "effect, if any, which the State's overtime practices have on interstate commerce." In his view, this balancing could be properly done only in "future cases presenting specific situations" concerning those overtime practices. J.S. App. 43a–45a, 269 F. Supp. at 851–852.

requirements that govern other employers operating enterprises engaged in commerce.[3]

The Tenth Amendment does not exempt the States from legislation enacted by Congress pursuant to its powers to regulate commerce. This Court has repeatedly so held. Thus, in *Sanitary District* v. *United States,* 266 U.S. 405—involving diversions of water from Lake Michigan for the City of Chicago which might adversely affect navigation—Mr. Justice Holmes, writing for a unanimous Court, stated that the power of the federal government to regulate commerce "is superior to that of the States to provide for the welfare or necessities of their inhabitants." *Id.* at 426. So also, in *United States* v. *California,* 297 U.S. 175, the Court held that the Safety Appliance Act could be constitutionally applied to a railroad operated by the State of California along the waterfront of San Francisco harbor. In so ruling, the Court rejected the argument of the State of California that in "operating the railroad without profit, for the purpose of facilitating the commerce of the port * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.* at 183. See, also, *California* v. *United States,* 320 U.S. 577; *California* v. *Taylor,* 353 U.S. 553; *Par-*

[3] Appellants apparently do not seek to challenge the lower court's determination that a school or hospital may be "an enterprise engaged in commerce" or that the enterprise concept may be relied upon to extend the Act's coverage to all employees of the enterprise, not only those whose particular jobs affect commerce. Both of those contentions were properly rejected by the court below (J.S. App. 9a–17a).

*den* v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184.[4]

We believe these decisions foreclose the argument that the Tenth Amendment is a bar to imposing the minimum wage and overtime provisions of the Act on the States and their political subdivisions in the operation of schools, hospitals and similar institutions. The stipulations of facts filed below establish that the activities of the States in operating such institutions have a substantial effect upon interstate commerce. Cf. *United States* v. *Darby,* 312 U.S. 100, 118; *United States* v. *Ohio,* 385 U.S. 9; *Wickard* v. *Filburn,* 317 U.S. 111; *National Labor Relations Board* v. *Reliance Fuel Oil Corp.,* 371 U.S. 224. Thus, we conclude that the 1966 Amendments to the Act were well within the legislative power of Congress under the Commerce

[4] Also relevant here is the decision of this Court in *Case* v. *Bowles*, 327 U.S. 92, which, although dealing with congressional action under the war power, confirms the proposition that even activities related to essential governmental functions of the States may be made subject to legislation enacted pursuant to a plenary power of the federal government. In *Case*, the Price Administrator sought to enjoin the Commissioner of Public Lands of the State of Washington from selling timber from school lands at prices above the ceiling established by regulations adopted pursuant to the Emergency Price Control Act. In upholding the Administrator's right to the injunction, the Court rejected the State's argument "that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" *Id.* at 101. Relying on *California* v. *United States*, *supra*, the Court held that the validity of a congressional exercise of the war power does not depend upon whether the State function affected is or is not "essential" to the State government. *Id.* at 101, 102. See, also, *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48.

Clause and that the court below properly dismissed the complaint.

In the absence of a substantial question, summary affirmance is of course appropriate. Rule 16(1)(c). Yet, we do not oppose plenary consideration. The questions presented are of obvious importance, affecting every State of the Union. Moreover, the separate opinions of the members of the court below cast substantial doubt on the constitutionality of the application of the overtime provisions of the Act to State employees and orderly administration suggests that this issue—which will inevitably recur—be authoritatively settled without delay.

Respectfully submitted.

ERWIN S. GRISWOLD,
*Solicitor General.*

NOVEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967